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No. 92-1072

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CAROL WEAVER, VICKI HAHN,
SHARRON L. CARROLL, ANGELA SEGRIST,
LOIS KUPFERBERG, and ALICE TENNENBAUM,
Petitioners,

v.

JOSEPH L. STEGER, President, and JILL PARRIS,
Interim Vice President for Human Resources and
Human Relations, University of Cincinnati; and
DISTRICT 925, SEIU, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF DISTRICT 925, SEIU, AFL-CIO, IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. May the District Court conditionally deny certification of a class when Plaintiffs refuse to provide, through discovery, information related to Plaintiffs' ability to properly represent the proposed class?

2. May a public employee union place the burden upon non-union members of a bargaining unit to indicate their desire to pay only those expenses chargeable under *Chicago Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986), rather than full union dues?

3. Where a court finds a procedural violation in a union's fair share collection procedures, may restitution be limited to the return of only those fees not related to the union's collective bargaining activities?

4. May a district court adopt the findings of an arbitrator as to the amount of a fair share fee upon the union's Motion for Summary Judgment, when the non-member Plaintiffs have offered no facts to contradict the arbitrator's findings?

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BRIEF OF DISTRICT 925, SEIU, AFL-CIO, IN OPPOSITION

STATEMENT OF THE CASE

A. Procedural History

This action arises from fair share fee deduction procedures adopted by Defendant-Respondent Local 925-Service Employees International Union (District 925) to collect a fair share fee from non-union members of its bargaining unit at the University of Cincinnati (the University) from July, 1990 to July, 1991. The Plaintiffs have petitioned for a Writ of Certiorari from a decision

of the U. S. Court of Appeals for the Sixth Circuit, dated July 23, 1992, which affirmed the District Court's grant of summary judgment on May 31, 1991. During the course of the litigation, District 925 altered its fair share fee collection procedures, primarily as the result of an arbitrator's decision and the rulings in this case. The District 925 fair share fee procedures now in use have not been challenged by the Plaintiffs.

The Complaint was filed on August 14, 1990, following notices distributed by District 925 to prospective fair share fee payors in May, 1990. On September 26, 1990, Plaintiffs moved for class certification (R. 18) under Rule 23(b)(1)(A) or (b)(2) of the Federal Rules of Civil Procedure. The six named Plaintiffs sought to represent a class comprised of themselves and "all employees of the University of Cincinnati who are represented for purposes of collective bargaining by Defendant 925 and are or were non-members of Defendant District 925 as of 3 May 1990." (R. 18). In response, District 925 noticed depositions of the six named Plaintiffs. During those depositions, District 925 sought to question the Plaintiffs on their motivations for opposing both the union and the collection of fair share fees. Yet counsel for the Plaintiffs instructed his clients not to answer such questions on grounds of an alleged "First Amendment privilege." (R. 22; Carol Weaver Deposition, pp. 12-13). As a result of these instructions to the individual Plaintiffs, District 925 was not able to discover the motivations, rationale, or objectives of the named Plaintiffs for opposing the union's fair share fee. On October 17, 1990, District 925 moved to compel answers to deposition questions (R. 22).

The District Court chose to resolve the discovery dispute by conditionally denying the Plaintiffs' Motion for Class Certification, while granting to Plaintiffs an opportunity to re-file their class motion if discovery by District 925 on the Plaintiffs' motivations was allowed (R. 35).

Rather than provide such discovery, Plaintiffs filed a notice with the District Court, stating that "they [would] not waive their First Amendment rights as a pre-condition to the Court's consideration of their Motion for Class Certification." (R. 39). As a result, Plaintiffs never renewed their Motion for Class Certification, and no class was certified.

As the federal litigation proceeded, an arbitration was conducted pursuant to the challenge procedures utilized by District 925, and under procedures administered by the American Arbitration Association (AAA). The arbitrator rendered an interim award on November 11, 1990 (R. 34, Exhibit A), which required District 925 to re-notify non-members on November 20, 1990 in a fashion which resolved several of Plaintiffs' objections to District 925's May, 1990 procedures (R. 34, Exhibit C). The new notification allowed objections by hand delivery or ordinary U. S. Mail, rather than by certified mail, and eliminated an internal hearing prior to arbitration. After transmitting the re-notification pursuant to the arbitrator's decision, District 925 moved for summary judgment on December 6, 1990 (R. 34). Plaintiffs also moved for summary judgment.

On May 31, 1991, the District Court entered a final judgment (R. 45), ruling in favor of District 925 on all but two issues: (1) The Court found that District 925 should have provided *separate* audits to fair share fee payors for *each* affiliate to which District 925 made "chargeable" payments during 1989. (Those affiliate payments represented only about 1.15% of District 925's "chargeable" expenditures in 1989); and (2) the Court found that the indemnification agreement between District 925 and the University concerning fair share fee challenges was void as against public policy. *Weaver v. University of Cincinnati*, 764 F. Supp. 1241 (S.D. Ohio 1991). Plaintiffs filed an appeal from that final judg-

ment.[1] The Sixth Circuit affirmed the District Court on July 23, 1992. 970 F.2d 1523 (6th Cir. 1992).

B. Relevant Facts and Prior Rulings

In 1990, District 925 adopted fair share fee procedures in order to comply with a variety of federal court decisions and Ohio Revised Code § 4117.09(C). Pursuant to those procedures, the accounting firm of Samuel Sindel Company ("Sindel") conducted an audit of District 925's financial records for the year ended December 31, 1989 (R. 5, Exhibit 6). Sindel then calculated the proportion of the union's 1989 expenditures believed to be properly "chargeable" to fair share fee payors, which excluded amounts attributable to partisan, political, or ideological activities. The Sindel audit report attributed ninety-one percent (91%) of District 925's expenditures for the

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[1] Plaintiffs had previously appealed an Order of the District Court denying a preliminary injunction on September 7, 1990. The District Court denied the injunction, on grounds that continued collection of fees from the six Plaintiffs would not pose irreparable harm. In a decision dated August 26, 1991, the Sixth Circuit reversed and remanded, based upon its conclusion that the "collection of a fair share service fee from the dissenting non-union members must be stayed by appropriate injunctive relief until a constitutionally adequate plan consistent with the holdings in *Abood*, *Hudson*, and this opinion is functioning." *Weaver v. University of Cincinnati*, 942 F.2d 1039 (6th Cir. 1991), *citing Tierney v. City of Toledo*, 824 F.2d 1497, 1507 (6th Cir. 1987). Subsequently, the District Court entered an injunction barring the further collection of fair share fees from the six named Plaintiffs, even though, by the fall of 1991, new and unchallenged procedures were in use by the union. The District Court also ordered the refund to the named Plaintiffs for all fees collected from them since September, 1990. As a result, the union has *fully* refunded to the named Plaintiffs all of the funds deducted from their paychecks, and has received no further agency fees from the six named Plaintiffs since the injunction was entered. No appeal was taken by either party following the District Court's entry of injunction on October 4, 1991. As a result, this Petition relates only to the District Court's May, 1991 decision on Cross-Motions for Summary Judgment, and the Sixth Circuit's July, 1992 decision affirming summary judgment.

year ended December 31, 1989, to "chargeable" activities. District 925 chose to charge a fair share fee of ninety percent (90%). (R. 5, Affidavit of Deborah Schneider.)

On May 3, 1990, District 925 mailed to approximately 400 "non-members" of its University bargaining unit a notice describing the union's fair share fee requirement (R. 5, Exhibit 3). The notice included a page of the Sindel audit report showing the major categories of union expenditures broken into chargeable and nonchargeable categories, and explained how non-members were entitled to "dissent," and thereby pay only 90% of union dues, representing the costs of collective bargaining, less any political or ideological activities of the union, or "challenge" the fair share fee through an arbitration hearing on whether or not District 925 had properly calculated its 90% fair share fee. *Id.* Individuals who neither dissented nor challenged were told that District 925's full dues would be deducted from their paychecks.

District 925 received by mail or hand delivery 157 "dissents" and 55 "challenges" from University employees (R. 5, Affidavit of Deborah Schneider). In July of 1990, the University began deducting 90% of union dues from the paychecks of the dissenters and challengers. One hundred percent (100%) of dues was deducted from the remaining non-members.

An arbitration was conducted under the AAA Rules for the Impartial Determination of Agency Fees in August, 1990 before Arbitrator Phyllis Florman (R. 5, Exhibits 4, 5) who rendered an interim award on November 11, 1990 (R. 34, Exhibit A). With respect to the *amount* of the fee, the arbitrator found that

> [a]s to the union's fair share fee calculation for 1989, it must be, and is, found that with the exception of the "Profesisonal Fees and Expenses," 925/SEIU met its burden of establishing, with reasonable precision and detail the constitutionally permissible bases for its chargeable expenditures.

Id. The arbitrator asked for additional information from District 925 on its charges for "Professional Fees and Expenses," which information was provided.

However, the arbitrator found three defects in District 925's notification *procedures.* Specifically, she found (1) that it was improper to require notification of a "dissent" or "challenge" by certified mail; (2) that it was improper for District 925 to use an internal appeal procedure before challengers could exercise their right to AAA arbitration; and (3) that the use of the word "rebate" in one entry of the financial statement may have confused potential challengers. *Id.*

As a remedy, the arbitrator ordered a re-notification of the District 925 non-members using proper procedures. *Id.* District 925 transmitted a new notice to all fair share fee payors on November 20, 1990 (R. 34, Exhibit C), which eliminated the internal hearing and certified mail requirement, and included the union's entire 1989 audit. *Id.* All non-members who had not previously "dissented" or "challenged" could do so with the right to a rebate of 10% of dues previously collected. Only a handful of additional "dissents" and "challenges" were received.

District 925 sent a new annual notification to non-members (the "1991 Procedures") on June 8, 1991 (R. 58, Affidavit of Deborah Schneider and Exhibit A), which satisfied Arbitrator Florman's requirements and the District Court's subsequent May 31, 1991 decision granting summary judgment.

On July 23, 1992, the Sixth Circuit affirmed the District Court's grant of summary judgment. The Sixth Circuit's holdings can be summarized as follows:

1. *Class certification*: The Court found that the District Court did not abuse its discretion in conditionally denying class certification:

> Because the named Plaintiffs refused to reveal their reasons for declining to join the union or for bringing this action, there simply was not any information before the Court regarding the Plaintiffs' motivations for instituting this proceeding. On the other hand, the District Court did have some indication that the named Plaintiffs' interests could be divergent from those of other members of the proposed class. Furthermore, the District Court denied the motion for certification conditionally, and indicated that it would reconsider upon a showing by the Plaintiffs that they meet Rule 23's requirement to serve as class representatives. We find no abuse of discretion in the District Court's ruling.

970 F.2d at 1531.

2. *The payment of 100% dues by non-dissenting non-members*: The Court found that once the union had provided an adequate notification to non-members on November 20, 1990, the union was entitled to require non-members to either "dissent" or "challenge," thereby obtaining an immediate 10% reduction from standard union dues. Without an objection, the non-member could be required to pay 100% of union dues. Relying upon this Court's decision in *Hudson*, and the Ninth Circuit's recent decision in *Mitchell v. Los Angeles Unified School Dist.*, 963 F.2d 258 (9th Cir.), *cert. denied*, 113 S.Ct. 375 (1992), the Court stated:

> . . . the Plaintiffs' argument must fall because it seeks to shift the balance of interest underlying all of the Supreme Court's pronouncements on the subject of agency shop fees. An "opt-in" procedure would greatly burden unions while offering only a modicum of control to non-union employees whose procedural rights have already been safeguarded by *Hudson*.

970 F.2d at 1533.

3. *The financial remedy available*: The Court rejected Plaintiffs' argument that the individual Plaintiffs, along

with other non-members, were entitled to a full refund of *all* fees collected under the union's procedure before it was corrected, relying upon *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 433 (6th Cir. 1990) (*Lowary II*), and this Court's decision in *Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 122 (1963). In *Lowary II*, the Sixth Circuit declined to award a remedy in the form of a 100% rebate of fair share fees, even though the union's fair share fee procedures were found to be defective, stating, "To allow Plaintiffs to recover for both chargeable and non-chargeable expenditures would constitute a windfall to Plaintiffs." 903 F.2d at 433. The Court concluded:

> In the absence of willful or malicious constitutional violations of *Hudson's* procedures, punitive damages in the form of a full refund of chargeable fees are unwarranted.

907 F.2d at 1534.[2]

REASONS FOR DENYING THE WRIT

The Petition should be denied because this case presents a collection of procedural and previously decided issues which hardly require review or reconsideration by this Court.

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONDITIONALLY DENYING CLASS CERTIFICATION IN LIGHT OF PLAINTIFFS' REFUSAL TO COOPERATE IN REASONABLE CLASS DISCOVERY

The District Court's *conditional* denial of class certification was simply an attempt to resolve a discovery

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[2] The Sixth Circuit also found in its July 23, 1992 opinion that the District Court properly set aside the indemnification language in the Collective Bargaining Agreement between the union and the University, and that the AAA's fair share fee procedures can properly be used to impartially determine objectives concerning agency fee calculations and procedures under *Hudson*. No party seeks review by this Court of those holdings.

dispute arising from Plaitiffs' counsel's over-zealous deposition practice. As a result, this case does not present the broad class representation issues which Plaintiffs assert in their Petition.

In seeking class certification, Plaintiffs have the burden of satisfying each of the requirements of Rule 23, Fed. R. Civ. Pro. *See, e.g., Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1308 (9th Cir. 1977). *See also General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). One prerequisite for class certification under Rule 23(a)(4) is that the representative parties must "fairly and adequately protect the interests of the class." As this Court has found, "a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940).

This Court's decisions on agency fee issues arising under the Railway Labor Act raise serious doubts about the propriety of any class action on behalf of non-union members objecting to union agency fees:

> This is not and cannot be a class action. . . . "The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities."

Brotherhood of Ry. and S.S. Clerks v. Allen, 373 U.S. 113, 119 (1963), *citing International Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961).

Defendants confronting a request for class certification are entitled to take discovery on each of the elements set forth in Rule 23(a), including the ability of the representative parties to "fairly and adequately protect the interests of the class." In *Eggleston v. Chicago Journey-*

men Plumbers' Local Union 130, 657 F.2d 890, 895 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982), the Seventh Circuit recognized that in a class action "some degree of discovery may be appropriate in certain cases to aid making the necessary class determinations." In *Eggleston*, the court recognized the need for discovery on the issue of whether or not "the named parties are qualified and capable of fully pursuing the common goals of the class without collusion or conflicts of interest." *Id.* at 896.

In deposing the named Plaintiffs, District 925 attempted to determine whether the named Plaintiffs would "fairly and adequately protect the interests of the class" they sought to represent—non-members of District 925 at the University. Generally, a representative may be adequate if his interests are not antagonistic to those of other class members. *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976). Initial questions of the adequacy of representation were raised by the Plaintiffs' Complaint, which sought broad and punitive relief from the union, including an Order barring the collection of *any* fair share fee, restitution of all fees collected and punitive damages (R. 1, pp. 22-25). Such relief could have crippled District 925's ability to represent all members of the bargaining unit, including non-union "free riders" who hoped to benefit from some aspects of union representation. In addition, some of the named Plaintiffs had participated in efforts to oppose organization of the union since its inception, publishing an anti-union newsletter, *The Onion*. While the financial destruction of the union might have been consistent with the goals of these individual Plaintiffs, those goals would not necessarily have been consistent with those of hundreds of non-members content to pay either 100% or 90% of union dues, while enjoying the wages, benefits and rights negotiated by the union.

The Seventh Circuit's decision in *Gilpin v. American Federation of State, County, and Municipal Employees*,

AFL-CIO, 875 F.2d 1310 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989), also suggests that the interests of Plaintiffs represented by counsel employed by the National Right-To-Work Legal Defense Foundation, Inc. could well be antagonistic to the interests of other union nonmembers. In *Gilpin*, the Seventh Circuit upheld the rejection of class certification in a comparable case, finding that the potential for conflicts within a proposed class of non-union employees precluded the named Plaintiffs from adequately representing the entire class of non-union employees:

> Two distinct types of employee will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay anymore for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the unions; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right To Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with—and only with—the aims of the first type of employee.

875 F.2d at 1313. The U.S. District Court for the District of Columbia denied class certification for similar reasons in *Abrams v. Communications Workers of America*, 132 LRRM 2910, 2912 (D. D.C. 1989).[3]

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[3] In their brief before the Sixth Circuit, counsel for the Plaintiffs attempted a rhetorical "mugging" of the author of the *Gilpin* decision, Judge Posner, characterizing that opinion as "a diatribe, not a model of disciplined legal reasoning," and accusing its author of being "confused over the parties or case before the Court." Plaintiffs also argued that "*Gilpin* is intemperate to the point of exhibiting a judicial bias at war with even the most primitive understanding of due process." (Pl. Sixth Circuit Brief, p. 24, fn. 18). Significantly, the Sixth Circuit disregarded this assault upon

More recently, the *Gilpin* decision was followed by the Fourth Circuit in *Kidwell v. Transp. and Communications Int'l Union*, 946 F.2d 283 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1760 (1992). The Fourth Circuit upheld a district court denial of class certification, noting in part that "the plaintiffs, once again represented by the National Right-To-Work Legal Defense Foundation, are not adequate representatives under Rule 23." 946 F.2d at 306. Those holdings are consistent with decisions of other Circuits allowing the denial of class certification where class representatives had interests or objectives conflicting with those of some proposed class members.[4] Petitioners cite no conflicting rulings on class issues in agency fee litigation from any other Circuit.

In light of the Seventh Circuit's opinion in *Gilpin*, counsel for District 925 reasonably sought discovery from the six Plaintiffs concerning their motivations and biases with respect to the union. Those questions were neither intrusive nor overly broad, but simply sought the basis for the Plaintiffs' motivation in bringing the lawsuit

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the reasoning in *Gilpin*, relying upon it in affirming the District Court's decision. (Sl. Op., p. 14).

[4] *See e.g., United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1284 (7th Cir. 1985) (denying class certification because some class members opposed benefit changes for which plaintiffs sued); *Peterson v. Oklahoma City Housing Auth.*, 545 F.2d 1270 (10th Cir. 1976) (some tenants support security deposit, so class of tenants in action opposing deposit inappropriate); *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972) (some utility customers likely to oppose additional expense of imposing hearing requirement for service termination, so class certification inappropriate); *Carroll v. American Fed'n of Musicians*, 372 F.2d 155 (2d Cir.), *cert. denied*, 389 U.S. 817 (1967), *aff'd on this point, rev'd on other grounds*, 391 U.S. 99 (1968) (class certification denied in action by orchestra leaders challenging union control of industry where evidence shows many orchestra leaders subscribe to union's policies); *see also Phillips v. Klassen*, 502 F.2d 362, 366 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974) (certification denied due to potential conflict over plaintiffs' challenge of an early retirement program).

against District 925 and the University. In response, Plaintiffs refused to disclose their motivations or attitudes toward the union, citing a so-called "First Amendment privilege." This tactic denied District 925 the opportunity to determine whether the named Plaintiffs were "hostile to unions on political or ideological grounds," which formed the basis for denial of class certification in *Gilpin*.

In response to District 925's Motion to Compel Discovery, filed pursuant to Rule 37(a)(2), Fed. R. Civ. Pro., the District Court sought to craft a compromise. Rather than compelling discovery, the District Court presented Plaintiffs with an option: either answer the questions or face the denial of class certification. This course of action by the District Court was not an abuse of discretion. Instead, it was a reasonable exercise by the District Court of the discretion allowed under Rule 23 (class certification) and under Rule 37 (sanctions for discovery abuse), Fed. R. Civ. Pro.[5]

This case does not present, as Petitioners contend, the issue of whether or not Plaintiffs represented by counsel employed by the National Right-To-Work Legal Defense Foundation, Inc., can fairly and adequately represent a class of non-union members. Because of Petitioners' refusal to engage in reasonable discovery, the District Court was never required to rule on that issue. Nor does this Court have before it a record which could allow it to review that issue.

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[5] District Court rulings on discovery motions and class certification issues are subject to reversal only upon a showing of abuse of discretion. A "district court retains broad discretion in determining whether an action should be certified as a class action, and its decision, based upon the particular facts of the case, should not be overturned absent a showing of abuse of discretion." *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988). Likewise, "the scope of discovery is within the sound discretion of the trial court." *Chrsyler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981).

II. ONCE A FULL *HUDSON* DISCLOSURE OCCURS, A UNION'S FAIR SHARE FEE PROCEDURES MAY FAIRLY PLACE THE BURDEN UPON NON-MEMBERS TO EXPRESS THE DESIRE TO PAY LESS THAN FULL UNION DUES

Plaintiffs argue that even where a union has satisfied the disclosure obligations set forth in *Hudson*, non-union members may not be required to object to the payment of 100% of union dues.

District 925's procedures include a full disclosure of the basis for the fair share fee calculation. The union then requires the non-member to respond by hand delivery or ordinary mail with a "dissent" or "challenge" to obtain a reduction of the payroll deduction to 90% of union dues. Non-members who neither "dissent" nor "challenge" must pay 100% of union dues. Contrary to the arguments of the Plaintiffs, such a procedure satisfies the standards set forth by this Court in *Hudson* and by every court which has considered this issue. In *Hudson*, this Court set forth a framework of procedures for the protection of the constitutional rights of non-union members required to pay agency fees. Those procedural safeguards were required specifically "because the non-union employee has the burden of raising an objection." 475 U.S. at 306. As stated by the Sixth Circuit in this case, "it follows that if employees did not bear the burden of objection, many of *Hudson's* procedural safeguards would be less restrictive on the union's collection activity." 970 F.2d at 1532.

This Court's decisions arising under the Railway Labor Act first established the proposition that non-union members wishing to pay less than full union dues have the burden of informing the union of their desire to pay only those expenses related to collective bargaining. *See, e.g., Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 238 (1956); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 744 (1961); and *Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 122 (1963). As an example, in *Street*, the Court found that:

> Any remedies, however, would properly be granted *only to employees who have made known to the union officials that they do not desire their funds to be used for political causes* to which they object . . . [*D*]*issent is not to be presumed—it must affirmatively be made known to the union* by the dissenting employee. The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subject to sanctions in favor of an employee who makes no complaint of the use of his money for such activities. (Emphasis added).

367 U.S. at 744.

In *Hudson*, this Court applied that doctrine to public employees, establishing a notification and disclosure requirement that would allow affected non-members to exercise their right to dissent only after receiving reliable information on the union's expenditures. This Court held:

> . . . that the constitutional requirements for the union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

However, so long as the union provides such an explanation and opportunity for challenge, "[T]he nonmember's 'burden' is simply the obligation to make his objection known." 475 U.S. at 306, n. 16.

The Sixth Circuit's earlier decision in *Damiano v. Matish*, 830 F.2d 1363, 1369, n. 8 (6th Cir. 1987) followed *Hudson* in finding that "the burden is on the individual employee to object to expenditures by the union for political or ideological purposes. . ." More recently, the Ninth Circuit in *Mitchell v. Los Angeles Unified School Dist.*, 963 F.2d 258 (9th Cir.), *cert. denied*, 113 S.Ct. 375 (1992), also rejected the identical argument made by the Petitioners in this case:

> The Supreme Court has never suggested that employees who are offered the opportunity to object to the union fee deduction and do not do so, act under any compulsion. There is thus no basis, either factual or legal, for the district court's conclusion that plaintiffs were "compelled" to acquiesce, in violation of their First Amendment rights.

963 F.2d at 262. Plaintiffs have cited no other Courts of Appeals decisions to the contrary on this issue.

This Court's fair share fee decisions establish a procedural framework designed to balance the interests of unions and non-members with respect to the collection of fair share fees. The *Hudson* procedures, with their requirement of disclosure, objection, and an impartial hearing to resolve challenges, fairly allocate the burdens placed on unions and non-members in resolving agency fee disputes. District 925's procedures now comply with *Hudson* and need not be reviewed by this Court.

III. A DISTRICT COURT NEED NOT REQUIRE THE FULL RESTITUTION OF ALL FAIR SHARE FEES COLLECTED UNDER PROCEDURES NOT FULLY SATISFYING *HUDSON*

The six Plaintiffs have already received a *full* refund. The District Court's injunction remains in effect even though District 925's procedures now satisfy the *Hudson* requirements. Yet Plaintiffs complain that they were unfairly denied relief "in the form of a complete refund of the Petitioners' property." Even though no class was certified, Plaintiffs claim that the remedy awarded should have been "the irrevocable return of all fees seized *from all class members* prior to complete compliance." (Petition, p. 22, emphasis added).

This Court's earlier decisions arising under the Railway Labor Act approved remedies which extended only to fees used for "non-chargeable", political or ideological activities. In *International Ass'n. of Machinists v. Street*, 367 U.S. 740, 775 (1961), the Court described an appropriate retrospective remedy:

> The portion of his money the employee would be entitled to recover would be in the same proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget.

367 U.S. at 775.

Likewise, in *Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 122-24 (1963), the court approved a remedy which:

> . . . would order (1) the refund to him of a portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures, and (2) a reduction of future such exactions from him by the same proportion.

In *Hudson*, the Court reiterated the right of a union, through collective bargaining, "to require non-union employees, as a condition of employment, to pay a fair share of the union's cost of negotiating and administering a collective bargaining agreement." 475 U. S. at 301. The remedy sought by Plaintiffs would undeniably deny the union that "fair share."

The Sixth Circuit properly concluded that the remedy sought by the Plaintiffs far exceeded the scope of appropriate remedies previously approved by this Court:

> In the absence of willful or malicious constitutional violations of *Hudson's* procedures, punitive damages in the form of a full refund of chargeable fees are unwarranted.

970 F. 2d at 1534, *citing Lowary II*, 903 F. 2d at 433. Any broader remedy would unduly penalize the union while allowing dissenters to avoid their legitimate obligation to share the costs of collective bargaining. Significantly, Plaintiffs cite no other decision of any federal court of appeals which supports their argument for a remedy of restitution exceeding the non-chargeable portion of any improperly collected fair share fee.[6]

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[6] Plaintiffs urge that there is a conflict between those Sixth Circuit decisions enjoining the collection of *future* fees until a

IV. ABSENT CONTRADICTING PROOF, THE DISTRICT COURT WAS ENTITLED TO RELY UPON THE ARBITRATOR'S CONFIRMATION OF THE UNION'S FAIR SHARE FEE CALCULATION IN GRANTING SUMMARY JUDGMENT

Arbitrator Florman, selected under the AAA's procedures for the calculation of union fees, affirmed District 925's May, 1990 fair share fee calculation. That arbitration decision was offered with District 925's Motion for Summary Judgment. In response, Plaintiffs failed to establish that questions of fact existed as to the propriety of the fair share fee calculation. In response to the cross-motions for summary judgment filed by the parties, the District Court ruled, in part, as follows:

> 4. The arbitrator correctly determined that the chargeability determination made by District 925 is valid. *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 433; *Tierney v. City of Toledo*, 917 F.2d 927, 935 (6th Cir. 1990).

However, the District Court acknowledged that its role exceeded simply "rubber stamping" the arbitrator's determination:

> The *Hudson* court does advise that an arbitration is a legitimate first step in the evaluation of the

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lawful procedure is adopted. *See, e.g., Lowary v. Lexington Local Bd. of Educ.*, 854 F.2d 131 (6th Cir. 1988) (*Lowary I*), with those cases, including this one, in which the Court has found that a remedy of restitution should include only those improperly collected fees which were not utilized for purposes of collective bargaining. *See, e.g., Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422 (6th Cir. 1990) (*Lowary II*). In fact, the Sixth Circuit's opinions fairly distinguish between what it characterizes as an obligation by a court to enjoin an ongoing First Amendment violation, as opposed to the court's obligation, once the violation has been corrected, to craft a retrospective remedy which does not deny to the union those funds which could have been properly charged. *See, e.g., Weaver II*, 970 F.2d at 1533-34. This approach fairly balances the interests of non-members to a constitutional fair share fee procedure, while likewise protecting the union's right to be fairly compensated for its efforts related to collective bargaining.

> validity of an agency fee plan. A district court may examine and ultimately ratify determinations made by a properly selected arbitrator upon a finding that an arbitrator's decision was correct.

764 F. Supp. at 1245.

Before this Court, Plainitffs now argue that the District Court improperly treated "Petitioners' claim for damages as effectively precluded by an unappealed decision issued by an individual acting at the sole behest of a constitutional tortfeasor. . . ." (Petition, p. 28). In fact, once District 925 had moved for summary judgment under Rule 56, Fed. R. Civ. Pro., and had supported that motion with an affidavit identifying the arbitrator's decision, the burden then shifted to the Plaintiffs to contest the arbitrator's findings as to the propriety of the fee with *facts*. Under Rule 56(e):

> When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

In this case, Plaintiffs never contested with facts the arbitrator's determination that the 90% fair share fee had been properly calculated by the union. As a result, the District Court did not err in granting summary judgment based upon the unchallenged findings of the arbitrator. Petitioners' legal arguments cannot conceal their own failure to include in the record facts sufficient to create questions of fact as to the arbitrator's decision which would have prevented summary judgment.

Regardless, broad precedent supports a district court's reliance upon an arbitrator's determination, particularly in the absence of facts offered to contest the arbitrator's

findings. In *Hudson*, the Court endorsed the use of arbitration in resolving questions about the calculation of fair share fees:

> Indeed, we think that an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decision maker, so long as the arbitrator's selection did not represent the union's unrestricted choice.

475 U. S. at 308, n. 21. Under the AAA Rules utilized by District 925, the arbitrator is unilaterally selected by AAA once District 925 requests arbitration as to its fee.

The Sixth Circuit had previously upheld the use of the AAA procedures, in *Damiano v. Matish*, 830 F.2d at 1372:

> Because the procedure adopted by the Union in this case would provide an opportunity for the participants to challenge the selection of a particular arbitrator for identifiable bias, and because the selection of the arbitrator would not be left solely to the discretion of the Union, this part of the Union's amended policy appears to meet the procedural requirements set forth in *Hudson*.

Other federal courts of appeals decisions acknowledge that an arbitrator's opinion may be treated as presumptively valid unless disputed with specific facts by nonmembers. *See, e.g., Tierney v. City of Toledo*, 917 F.2d 927, 935 (6th Cir. 1990) (*Tierney III*); *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 433 (6th Cir. 1990) (*Lowary II*); and *Kidwell v. Transp. Communications Int'l Union*, 946 F.2d 283 (4th Cir. 1991).

The record shows that the District Court properly weighed the unrebutted findings of the arbitrator before granting summary judgment in favor of District 925 as to the amount of the agency fee. Petitioners are not entitled to a reversal of that finding, since they failed to offer any facts in response to District 925's Motion for Summary Judgment to dispute the arbitrator's findings.

CONCLUSION

The Petition should be *denied, since this case does not* present a compelling or important question of grave public concern, and does not present issues regarding which there is a conflict among the Courts of Appeals:

1. The class certification issues arise only from the District Court's reasonable exercise of discretion under Rule 23 or Rule 37, Fed. R. Civ. Pro.;

2. The union's requirement that non-members must object in order to pay less than full union dues was contemplated by this Court in *Hudson;*

3. The broad remedy of 100% restitution sought by Plaintiffs is contrary to this Court's rulings in *Street* and *Allen* and would deny the union its "fair share."

4. The District Court could properly review and accept the arbitrator's findings in the absence of contesting facts from Plaintiffs.

For these reasons, the Petition should be denied.

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